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No. 93-1742

In The

Supreme Court of the United States

October Term, 1993

LUMMI INDIAN TRIBE,

Petitioner,

v.

WHATCOM COUNTY, WASHINGTON;
BARBARA CORY, TREASURER
OF WHATCOM COUNTY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

May 27, 1994

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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE FOLLOWING QUESTIONS PRESENT THIS COURT WITH "SPECIAL AND IMPORTANT REASONS" FOR GRANTING THE LUMMI INDIAN TRIBE'S PETITION FOR A WRIT OF CERTIORARI?

I. Whether the Ninth Circuit erred in deciding that land owned in fee by the Lummi Tribe is taxable if it is alienable?

II. Whether four parcels of alienable land on the Lummi Indian Reservation became inalienable upon acquisition by the Lummi Tribe in fee during the 1970's and 1980's?

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COUNTERSTATEMENT OF FACTS AND LAW

Pursuant to Rule 15.1, the following are perceived misstatements of fact and law in the Lummi Tribe's petition which may have bearing on the issues presented.

(1) The statement on p. 4 of the petition that the factual history of the Lummi parcels is not in dispute is true only insofar as all facts were reviewed in a light most favorable to petitioner when the District Court granted respondents' Motion for Summary Judgment.

(2) Several statements are made concerning an alleged conflict between the present decision of the Ninth Circuit and the law of the Tenth Circuit. See pp. 16-18 of Petition for Writ of Certiorari. This is an inaccurate statement of the law. There is no such conflict between the circuits. See pp. 11-13 of this Brief.

SUMMARY OF ARGUMENT

(1) The Ninth Circuit's decision in the case at bar is consistent with the only two other cases decided by this Court concerning ad valorem taxation of Indian owned fee lands. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. ___, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992); *Goudy v. Meath*, 203 U.S. 146, 27 S. Ct. 48, 51 L. Ed. 130 (1906). The Court in *Goudy* decided that alienable Indian land was generally subject to ad valorem taxation. The analysis of *Goudy* was reviewed and cited approvingly by this Court in dicta, in *Yakima Nation*. The present case involves land patented pursuant to the same treaty that the land was patented under in *Goudy*. There being no legitimate distinction between *Goudy* and the present case, the petition should be denied.

(2) The Ninth Circuit's holding that the subject parcels of fee land did not become inalienable upon their acquisition by the Lummi Tribe in the 1970's and 1980's does not conflict with the law of the Tenth Circuit. Petitioner points to no cases of this Court with which the Ninth Circuit's decision conflicts. The analysis of the Ninth Circuit being sound on this issue, their remains no reason to accept review of the petition.

ARGUMENT

Rule 10 states that "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Guidance is provided in Rule 10.1.(a)-(c) in identifying reasons which may be considered special or important. Among the reasons identified are:

> (1) a conflict among two or more United States courts of appeal;
>
> (2) a conflict between a United States court of appeal and a state court of last resort over a federal question;
>
> (3) a United States court of appeal has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court as to call for the Court's supervision;
>
> (4) a state court or a United States court of appeal has decided an important question of federal law which should be settled by the Court, or has decided a federal question in a way that conflicts with applicable decisions of the Court.

The Lummi Tribe's petition very obviously does not qualify under the first three reasons. Only under the last basis can a colorable argument be made by the Lummi Tribe for certiorari being granted. As expressed below however, the Lummi Tribe's petition also fails to present a convincing case for accepting review under the fourth reason identified.

I. THE NINTH CIRCUIT'S RULING IS CONSISTENT WITH THIS COURT'S DECISIONS REGARDING INDIAN-OWNED FEE LAND ON A RESERVATION BEING SUBJECT TO STATE AD VALOREM TAXATION.

The Ninth Circuit's ruling in the case at bar is predicated upon two prior decisions of this Court – *Goudy v. Meath*, 203 U.S. 246, 27 S. Ct. 48, 51 L. Ed. 130 (1906) and *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. ___, 112 S. Ct. 2d 683, 116 L. Ed. 2d 687 (1992). This Court in *Goudy* was presented with the question of whether allotted land owned in fee by a Puyallup Indian was subject to state ad valorem taxation. *Goudy v. Meath*, 51 L. Ed. at 130. In *Goudy*, the land was patented under the authority of the Treaty with the Omahas (1854), which is the same treaty under which patents were authorized for the land in the present case. *Goudy v. Meath*, 51 L. Ed. at 131. The land in *Goudy* was not patented pursuant to the General Allotment Act.

The *Goudy* Court held the land was subject to state ad valorem taxation. *Id* at 132. The primary rationale for upholding the land's taxability in *Goudy* was not the General Allotment Act, but the alienable status of the land. Eighty-six years later, this Court recognized the land's alienability as the primary basis for its decision in *Goudy*:

> *Goudy* did not rest exclusively, or even primarily, on the § 6 grant of personal jurisdiction over allottees to sustain the land taxes at issue. Instead, it was the *alienability of the allotted lands* – a consequence produced in the present case not by § 6 of the General Allotment Act, but by

> § 5 – that the Court found of central significance. As the first basis of its decision, before reaching the "further" point of personal jurisdiction under § 6, *id.*, at 149, 27 S. Ct. at 50, the *Goudy* Court said that, although it was certainly possible for Congress to "grant the power of voluntary sale, while withholding the land from taxation or forced alienation," such an intent would not be presumed unless it was "clearly manifested." *Ibid.* For "it would seem strange to withdraw (the) protection (of the restriction on alienation) and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it (*sic*) from taxation." *Ibid.* Thus, when § 5 rendered the lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.

County of Yakima v. Yakima Indian Nation, 502 U.S. ___, 112 S. Ct. at 690-91 (emphasis in original).

Under the above-cited analysis, once the power of voluntary sale is granted, the land will be subject to taxation unless another intent is clearly manifested. *Goudy v. Meath*, 51 L. Ed. at 132.

Petitioner points out that a tax exemption and nonalienability are two separate subjects. Petition for Writ of Certiorari, p. 10, citing *Choate v. Trapp*, 244 U.S. 665, 673 (1912). The *Goudy* Court also recognized this to be true. The *Goudy* Court stated "That Congress may grant the power of voluntary sale while withholding the land from taxation or forced alienation may be conceded. For illustration, see treaty of January 31, 1855, with the Wyandotts (10 Stat. at L. 1159, 1161)." *Goudy v. Meath*, 51 L. Ed. 132.

The fact that a tax exemption and non-alienability may conceptually be severed however does not help the petitioner. Congress historically included within treaties specific tax exemptions for voluntarily alienable Indian lands when it intended such exemptions.[1] The absence of such an exemption in the Treaty with the Omahas is evidence that Congress intended such land to be subject to taxation.

Cases cited by petitioner to prove the Court turned away from state taxation on Indians involved taxation of items (e.g., personal property, income, sales) which, unlike fee land, were not historically named in treaties as

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[1] Explicit fee land tax exemptions are present in other treaties. In *Choate v. Trapp*, 424 U.S. 665, 56 L. Ed. 941 (1912), the Supreme Court recognized that a prior treaty with the Choctaw and Chickasaw Tribes and an accompanying Congressional statute containing an explicit 21-year tax exemption for Indian-held fee land created a vested property right under the Fifth Amendment which could not be abrogated by later statute. *Id.* at 56 L. Ed. 946 -947. The Court in *Choate* also referred to a Treaty with the Delaware Tribe wherein the Indians were to receive fee lands which the agreement declared "should not thereafter be subject to tax." *Choate v. Trapp*, 56 L. Ed. at 946, citing *New Jersey v. Wilson*, 3 L. Ed. 303. This agreement vested the Indians with a binding, constitutionally protected right. *Choate v. Trapp*, 56 L. Ed. 946.

The treaties with the Wyandotts referred to in *Goudy*, the Choctaw and Chickasaw Tribes reviewed in *Choate* and the Delaware Tribe referred to in *Wilson*, all contained various express provisions exempting Indian-held fee land from taxation. The Treaty with the Omahas, under which petitioner's allotments were made, contained no such express provision. Treaty with the Omahas, Article 6, 10 Stat. 1043; See Petition for Writ of Certiorari, Appendix C-2.

exempt from taxation. See Petition for Writ of Certiorari, pp. 7-9.

The plain language of *Goudy* does not contain the same limitations on ad valorem taxation which this Court has later placed upon other kinds of taxes. Under *Goudy*, alienable land is taxable, unless Congress otherwise directs. Moreover, the *Goudy* decision was twenty-eight (28) years old when Congress abruptly changed its Indian policies with adoption of the Indian Reorganization Act in 1934. The significance of this was noted by the Court in *Yakima Nation*:

> And when Congress, in 1934, while putting an end to further allotment of Reservation land, see 25 USC § 461, chose *not* to return allotted land to pre-General Allotment Act status, leaving it fully alienable by the allottees, their heirs and assigns, [citing authorities], it chose not to terminate state taxation upon those lands as well.

Id. at 691. (Emphasis in original).

Under the holding by the Court in *Goudy* and its reasoning in *Yakima Nation*, it is clear that alienable land held by the Lummi Indian Tribe is taxable.

Despite the Court's ruling in *Goudy* and the favorable review of *Goudy* in *Yakima Nation*, petitioner makes several contentions why certiorari should nevertheless be granted. Petitioner first argues that the Burke Act's 1906 amendment to § 6 of the General Allotment Act which provided for removal of "all restrictions as to sale, incumbrance or taxation of said land," is the only grounds upon which Indian owned fee land may be subject to state ad valorem taxation. Petition for Writ, pp. 9-12.

In support of this contention, petitioner relies upon two "factors." First, petitioner argues that if the removal of restrictions on sale was sufficient to render the land taxable, Congress would have found it unnecessary to include the removal of "restrictions as to . . . taxation," as well as the removal of "restrictions as to sale," both of which are found in the proviso of the amendment to section 6.

Putting aside the fact that this argument ignores *Goudy* and the Court's interpretation of *Goudy* in *Yakima Nation*, the argument also ignores the purpose of the Burke Act. In *Yakima Nation*, the Court found the purpose of the Burke Act was to "change the outcome of our decision in *In re Heff*" and to allow for issuance of fee patents prior to expiration of the trust period, without subjecting Indians to the full plenary power of the state. *Id.* at 691. The Burke Act proviso on state taxation in § 6 was designed to preserve the rule of taxability for lands patented in fee prior to expiration of the trust period. The *Yakima* Court succinctly noted:

> In other words, the proviso reaffirmed for such "prematurely" patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes.

Id. at 691.

The Court also noted that the proviso was "nothing more than an acknowledgement (and clarification) of the

operation of section 5 with respect to *all* fee patented land . . . ". *Id.* at 691, n.4.[2]

Hence, the clear purpose of the proviso was to provide clarification for the status of prematurely patented land. It strains credulity to suggest that, in an attempt to provide such clarification, by stating the restrictions as to sale and taxation in the same proviso, Congress evinced an intent to exempt all non-General Allotment Act Indian fee lands from taxation. Petitioner's argument further unravels upon realization that when Congress, in 1934, put an end to further allotment of reservation land, it chose not to terminate state taxation upon those lands already allotted. See argument on p. 7, citing *Yakima Nation* at 691.

Second, petitioner points out that the *Yakima Nation* Court upheld state ad valorem taxation under the § 6 proviso of the General Allotment Act, but invalidated the state's excise tax on the sale of fee land by Indians. Petitioner argues that if the emphasis on the consequences of alienability in *Goudy* were sufficient by itself subject the land to taxation, then that emphasis would have been sufficient to subject to taxation the freely alienable proceeds of the sale of the land. Petition for Writ Of Certiorari, p. 12.

Again, petitioner's argument assumes that this Court misanalyzed the *Goudy* ruling in *Yakima Nation*. Contrary to petitioner's implication however, this Court in *Goudy* very clearly decided the land was taxable based upon its

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[2] Presumably the Court was referring to all land patented under the General Allotment Act.

alienability and this Court in *Yakima Nation* very clearly recognized that fact. *Id.* at 690-691 (quoted on pp. 4-5 herein). Moreover, the *Yakima Nation* Court distinguished an ad valorem tax from an excise tax. The ad valorem tax flows exclusively from ownership of realty on the annual assessment date. *Id.* at 692, *Timber Traders, Inc. v. Johnston*, 87 Wn. 2d 42, 47, 548 P. 2d 1080, 1083 (1976). The tax creates a burden on the property alone. *Yakima Nation* at 692, R.C.W. 84.60.020. The ad valorem tax constitutes taxation of land. *Yakima Nation* at 692.

On the other hand, an excise tax is not a tax upon the land, but a tax upon the sale of land. *Id.* at 693, citing, *Mahler v. Tremper*, 40 Wn. 2d 405, 409, 243 P. 2d 627, 629 (1952). While an excise tax may not be inconsistent with *Goudy*, such a tax is certainly not directly authorized by *Goudy*. The *Yakima Nation* Court was not prepared to extend taxation to Indian fee land owners beyond that afforded by in rem jurisdiction. The Court's decision on the excise tax issue has no impact on the continued viability of *Goudy v. Meath*.

Finally, petitioner seeks to undermine the importance of *Goudy* by arguing facts which appear nowhere in the Court's decision and upon which the decision was clearly not based. Petitioner states that the "crucial fact" in *Goudy* is that Mr. Goudy was formerly a member of the Puyallup Tribe who at the time had entirely severed his Tribal relation. Petition for Writ of Certiorari, p. 13. The decision of the Court, however, simply refers to Mr. Goudy as a Puyallup Indian and makes no mention of severed tribal relations. *Goudy v. Meath*, 203 U.S. 246, 27 S. Ct. 48, 51 L. Ed. at 131. The decision is written as applicable to an Indian claiming a tax exemption by virtue of the

Treaty with the Omahas. It is inappropriate to add facts which are not mentioned in the opinion, much less rely upon them as an invisible basis for the decision.

II. THE FOUR SUBJECT PARCELS OF FEE LAND ON THE LUMMI RESERVATION DID NOT BECOME INALIENABLE UPON THEIR ACQUISITION BY THE LUMMI TRIBE IN THE 1970'S AND 1980'S.

Petitioner argues that certiorari should be granted due to an alleged conflict between the Ninth Circuit's decision in this case and the law of the Tenth Circuit. Specifically, petitioner argues that in *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), the Tenth Circuit applied the Non-Intercourse Act (25 USC 177) to restrict the sale of fee land purchased by the Pueblo Indians between 1936 and 1939. Petition for Writ of Certiorari, p. 17. Petitioner incorrectly suggests that the Tenth Circuit categorically applies 25 USC 177 to restrict alienation of all tribally-owned fee land.

The Pueblo Indians (the Pueblo) are a relatively special case, and *Alonzo* is inapposite to the case at bar. The Pueblo, prior to the Treaty of Guadalupe Hidalgo, held good and complete title to lands now in New Mexico, including the land later reacquired by the Pueblo, which was at issue in *Alonzo*. *Id.* at 192-193, 196. Title of the Pueblo to the lands at issue was confirmed by Congress in 1860 and patented in 1884. *Id.* at 193. The Pueblo, collectively, as a community, were held to have fee simple title to the lands of the Pueblo. *United States v. Candalaria*, 271 U.S. 432, 46 S. Ct. 561, 70 L. Ed. 1023, 1025 (1926).

Congress has consistently acted to ensure Pueblo lands are not freely alienable or taxable. In 1851, Congress extended the Non-Intercourse Act to the Pueblos. *United States v. University of New Mexico*, 731 F.2d 703, 706 (10th Cir. 1984). A decision by the territorial court holding the Pueblo lands taxable in 1904 was promptly followed by a congressional enactment annulling the taxes already levied and forbidding further levies. *United States v. Candalaria*, 70 L. Ed. at 1026; *Alonzo v. United States*, 249 F.2d at 194.

In 1906 (under the New Mexico Enabling Act), Congress declared that the lands of the Pueblo Indians "shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." *United States v. University of New Mexico*, 731 F.2d at 706. This was at a time when fee patent lands issued to members of other tribes were alienable and taxable. See 25 USC 349; *Goudy v. Meath*, 51 L. Ed. at 132. In 1924, Congress again prohibited sale of any Pueblo lands. *Alonzo v. United States*, 249 F.2d at 195. On the heels of these congressional prohibitions on sale of Pueblo fee lands, the *Alonzo* court ruled that land purchased by the Pueblos from 1936-1939 from territory disputed under their original claim, was not alienable. *Id.*

Petitioner points to no such recent or continual congressional prohibitions on sale of land held by the Lummi Tribe. The Lummi lands were patented and made freely alienable pursuant to acts of Congress. See Petition for Writ of Certiorari; 25 USC 372. Petitioner cites no act of Congress subsequent to issuance of the fee patents requiring the lands at issue to return to non-alienable

status upon their reacquisition by the Tribe. Further, petitioner cites no judicial authority requiring that Indian land approved for alienation by Congress and later reacquired by a tribe must return to non-alienable status pursuant to 25 USC 177.

Finally, contrary to petitioner's assertion, *Buzzard v. Oklahoma Tax Commission*, 992 F.2d 1073 (10th Cir. 1993), does not rule that 25 USC 177 renders tribally-owned fee land inalienable absent federal approval. In *Buzzard*, the tribe's charter prohibited it from disposing of fee land without approval by the Secretary of the Interior. *Buzzard v. Oklahoma Tax Commission*, 992 F.2d at 1075. The Lummi Tribe asserts no similar prohibition in its charter. Most significantly, the *Buzzard* court specifically declined to rule whether 25 USC 177 requires federal approval prior to tribal sale of fee lands. *Buzzard v. Oklahoma Tax Commission*, 992 F.2d at 1077. Hence, contrary to petitioner's claim, the issue is obviously not settled in the Tenth Circuit and this Court's decision would not conflict with the law therein.

Should the Lummi Tribe prefer its recently purchased fee land to become inalienable and not subject to tax, it may convey said land in trust to the government and thereby remove it from state tax rolls. 25 USC 465. In fact, one of the factors the BIA considers in deciding whether to accept new trust land is the effect on a state of removing the land from its tax rolls. *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), citing 25 CFR § 151.10(3) (1992).

CONCLUSION

The Lummi Indian Tribe's petition fails to demonstrate a conflict among the United States circuit courts of appeal. Likewise, the petition does not demonstrate the existence of a conflict between the Ninth Circuit's decision and applicable decisions of this Court. On the contrary, the Ninth Circuit's decision is consistent with the two cases from this Court concerning state ad valorem taxation of Indian owned fee land.

Unfortunately for the petitioner, *Goudy v. Meath*, 51 L. Ed. 132, is virtually indistinguishable from the case at bar. Both cases involve an ad valorem tax exemption claim for Indian owned fee land, patented pursuant to authority from the Treaty with the Omahas (1854). The Court in *Goudy* found the land to be taxable because it was alienable and this reasoning was cited with approval by the Court in *Yakima Nation*.

In deciding *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), the Ninth Circuit scrupulously followed this Court's ruling in *Goudy* and its interpretation of *Goudy* in *Yakima Nation*. The Ninth Circuit's decision is quite consistent with the Court's decisions on ad valorem taxation. For all of these reasons, the Lummi Tribe's petition should be denied.

Respectfully submitted this 27th day of May, 1994.

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